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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ThermoLife International, LLC, an Arizona
limited liability company,

Plaintiff,

v.

<https://ronkramermusclebeach.wordpress.com/>, an
Internet domain name;
<https://ronkramermusclebeach.wordpress.com/auth>
or [musclebeachkramer/](#), an Internet domain name,

Defendants.

Case No. CV15-01616 HRL

**NON-PARTY AUTOMATTIC INC.'S
REPLY IN SUPPORT OF MOTION TO
INTERVENE**

Date: June 2, 2015

Time: 10:00 am

Judge: Magistrate Judge Howard R. Lloyd
Ctrm: 2, 5th Fl.

Complaint filed: April 8, 2015

Trial date: none set

1 **I. INTRODUCTION**

2 Much of ThermoLife's Opposition addresses the merits of its case, but the motion before
 3 this Court is a motion to intervene, and not a motion to dismiss.¹ The sole question before this
 4 Court is whether Automattic meets the standard to intervene as a matter of right or permissively.
 5 Automattic respectfully submits that the answer to this critical question is "yes."

6 ThermoLife alleges that the Muscle Beach Domains violate the ACPA and further alleges
 7 that Automattic is a "domain name authority." Automattic denies these allegations in its proposed
 8 Answer and seeks a judgment "declaring that the Muscle Beach Domains do not violate 15 U.S.C.
 9 § 1125(d)." These two issues are at the heart of Plaintiff's Complaint. Automattic seeks to
 10 intervene to protect its property rights in the domain names at issue as well as to protect its
 11 business and its users. These interests are "protectable" under Rule 24 and Ninth Circuit case law,
 12 and therefore Automattic's motion should be granted.

13 **II. ARGUMENT**

14 **A. Automattic Has a Significant Protectable Interest in Protecting its Property
 15 Interest in its Domain Name and in Protecting the Free Speech Rights of its
 16 Users**

17 Plaintiff mischaracterizes Automattic's interest in this litigation and the relief sought by
 18 Automattic in its Counterclaim in Intervention. Automattic's interest in this litigation is in
 19 protecting its property interest in its domain name and protecting the free speech rights of its
 20 users.² These interests are "significantly protectable" under Rule 24(a). As explained by the Ninth
 21 Circuit in *S. Cal. Edison Co. v. Lynch*,

22 ///

23 ¹ Automattic disagrees with ThermoLife's arguments in Section I of its Opposition and addressed
 24 them in its Opening Brief. As these arguments do not go to the merits of Automattic's motion to
 25 intervene, Automattic will not further refute them other than to cite to the only case either party has
 26 found to directly address the issue of third-party domains, *GoForIt Entm't, LLC v. DigiMedia.com
 L.P.*, 750 F.Supp.2d 712 (N.D. Tex. 2010).

27 ² ThermoLife claims that Automattic does not have such an interest, stating that the Muscle Beach
 28 Domains violate the Automattic Terms of Service. (Opp. At 1.) First, Automattic denies that the
 Muscle Beach Domains violate its Terms of Service. Second, Automattic objects to ThermoLife's
 exhibits, including the Terms of Service, as the documents are not properly authenticated.
 Pursuant to L.R. 7-5, all exhibits attached to the Opposition should be stricken.

1 An applicant has a “significant protectable interest” in an action if (1) it asserts an
 2 interest that is protected under some law, and (2) there is a “relationship” between
 3 its legally protected interest and the plaintiff’s claims. The relationship requirement
 4 is met if the resolution of the plaintiff’s claims actually will *affect the applicant*.
 5 The “interest” test is not a clear-cut or bright-line rule, because *no specific legal or
 6 equitable interest need be established*. Instead, *the “interest” test directs courts to
 7 make a practical, threshold inquiry*, and is primarily a practical guide to disposing
 8 of lawsuits by involving as many apparently concerned persons as is compatible
 9 with efficiency and due process.

10 307 F.3d 794, 803 (9th Cir.2002) (emphasis added). “The ‘interest test’ is basically a threshold
 11 one, rather than the determinative criterion for intervention, because the criteria of practical harm
 12 to the applicant and the adequacy of representation by others are better suited to the task of limiting
 13 extension of the right to intervene. *Fresno Cnty. v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).
 14 Plaintiff’s Opposition suggests that there is a very high bar for intervention as of right. However,
 15 *United States v. Alisal Water Corp.*, a case quoted by Plaintiff, explained, “[i]n determining
 16 whether intervention is appropriate, courts are guided primarily by practical and equitable
 17 considerations, and the requirements for intervention are broadly interpreted in favor of
 18 intervention.” 370 F.3d 915, 919 (9th Cir. 2004). Automattic has a significantly protectable
 19 interest under this broad and flexible standard.

20 Automattic has a legally protected property interest in the registered domain name. See
 21 *Kremen v. Cohen*, 337 F. 3d 1024, 1029-30 (9th Cir. 2003) (domain names are property); *Media*
 22 *Lab, Inc. v. Collis*, No. C08-04732 HRL, 2010 WL 3893582, at *5 (N.D. Cal. Sept. 30, 2010)
 23 (citing *Kremen*, stating “Under California law, an internet domain name is property.”). A property
 24 right is a “protectable interest” that will support a motion for intervention as of right. *N. California*
 25 *River Watch v. Fluor Corp.*, No. 10-CV-05105-MEJ, 2014 WL 3385287, at *16 (N.D. Cal. July 9,
 26 2014). Automattic also has a direct and significant interest in protecting the free speech rights of
 27 its users. Likewise, there is a relationship between Automattic’s interest and Plaintiff’s claims
 28 because a decision in this case will have a significant impact on Automattic and all of its users
 including the Muscle Beach user. See *In re Estate of Marcos*, 536 F.3d 980, 2008 WL 2924977, at
 *3 (9th Cir. July 31, 2008) (“The relationship requirement is met if the resolution of the plaintiff’s
 claims actually will affect the applicant.”).

1 The potential harm to Automattic and its users here is exactly the type of harm that led the
 2 court in *Select Retrieval, LLC v. ABT Electronics* to conclude that Adobe Systems had a significant
 3 protectable interest in intervening as a matter of right. Case No. 11-C-03752, 2013 WL 6576861
 4 (N.D. Ill., Dec. 13, 2013). In that case, Adobe sought to intervene in a patent infringement case
 5 against two of its customers. The court concluded that Adobe had a significant protectable interest
 6 in determining whether its customers were infringing on the patent. *Id.* at *2. The Court also
 7 concluded that Adobe's ability to defend its technology would be compromised if not permitted to
 8 intervene. *Id.* According to the Court, this was underscored by the fact that Adobe (through its
 9 customers) would be subject to inconsistent judgments regarding whether its technology infringes
 10 the patent and would be forced to proceed inefficiently in piecemeal fashion even though the same
 11 technology was at issue in the various cases. *Id.*

12 Just as in *Select Retrieval*, Automattic has an interest in protecting not only its user with the
 13 third-level domain “ronkramermusclebeach,” but all of its users. A judicial determination that the
 14 Muscle Beach Domains are covered by the ACPA could chill speech and affect many of
 15 Automattic’s users. Moreover, these interests are not adequately represented. The user has not
 16 appeared or been served, and Plaintiff objected to the appointment of a guardian ad litem for the
 17 Muscle Beach Domains. (*See* Dkt. Number 9.) Even if the user were to appear, he or she would
 18 likely lack the expertise and incentive to defend Automattic’s platform and technology. *See*
 19 *Ancora Technologies, Inc. v. Toshiba Am. Info. Sys., Inc.*, No. SACV080626AGMLGX, 2008 WL
 20 4326788, at *1 (C.D. Cal. Sept. 22, 2008) (“Applicant’s interest is not adequately represented by
 21 the existing Defendants because none has comparable expertise or incentive to defend Applicant’s
 22 own software and technology”).

23 **B. Automattic Seeks Declaratory Relief That The Muscle Beach Third-Level**
 24 **Domain Does Not Violate 15 U.S.C. § 1125(d)**

25 Plaintiff also mischaracterizes the relief sought by Automattic in its Counterclaim in
 26 Intervention. Automattic does not seek an “advisory opinion.” Rather, Automattic seeks judgment
 27 “declaring that the Muscle Beach Domains do not violate 15 U.S.C. § 1125(d).” (*See* Morton
 28 Decl., (Dkt. No.7-1, Ex. A, Proposed Counterclaim, Prayer ¶ C.) Automattic’s proposed

1 Counterclaim is directly related to Plaintiff's Complaint, which seeks "a preliminary and
 2 permanent injunction requiring the domain name registrar to transfer" the Muscle Beach Domains.
 3 (Complaint, Dkt. No. 1, at Prayer, ¶ A.) As discussed above, Automattic has a significant
 4 protectable interest in seeking this relief. Automattic seeks to intervene to protect its interests that
 5 are directly at issue in this litigation, and its interests in this case go far beyond merely obtaining a
 6 "favorable precedent" – it seeks to protect its property rights in its domain name as well as the free
 7 speech rights of its users.

8 **C. Chilling Speech Harms Automattic And Its Users**

9 As discussed in the opening brief, Automattic's business is based on empowering speakers.
 10 Lawsuits that seek to silence speakers chill speech, and when such lawsuits are filed against
 11 Automattic's property (the domain names) and are based on user conduct, Automattic and its users
 12 are harmed. "The Internet and other interactive computer services offer a forum for a true diversity
 13 of political discourse, unique opportunities for cultural development, and myriad avenues for
 14 intellectual activity." 47 U.S.C. § 230(a)(3). The United States has a long history of protecting
 15 anonymous and even hurtful speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357
 16 (1995). "[T]he point of all speech protection . . . is to shield just those choices of content that in
 17 someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and*
 18 *Bisexual Group of Boston*, 515 U.S. 557, 574 (1995).

19 Plaintiff's Opposition claims that *Lamparello v. Falwell* is "inapposite." (Opp. At 11.)
 20 The Opposition cites to another case, *Newport News Holdings Corp. v. Virtual City Vision*, that
 21 Plaintiff claims holds that "*Lamparello* did not apply to the ACPA." However, *Newport News*
 22 merely states that the "likelihood of confusion" test in *Lamparello* was made "in the context of
 23 trademark infringement, not the ACPA." *Newport News Holdings Corp. v. Virtual City Vision*,
 24 650 F.3d 423, 436 (4th Cir., 2011). It is true that the "likelihood of confusion" cite is in the portion
 25 of *Lamparello* that relates to trademark infringement. See *Lamparello v. Falwell*, 420 F.3d 309,
 26 316 (4th Cir. 2005). Automattic did not cite to this portion in its Opening Brief. (See Opening
 27 Brief at 8.) Instead, Automattic cited to the portion of *Lamparello* that does concern the ACPA.
 28 The relevant portion of *Lamparello* states that the ACPA "was not intended to prevent

1 ‘noncommercial uses of a mark, such as for comment, criticism, parody, news reporting, etc.’, and
 2 thus they ‘are beyond the scope’ of the ACPA.” *Lamparello*, 420 F.3d at 318-19; *see also Aviva*
 3 *USA Corp. v. Vazirani*, 902 F.Supp.2d 1246, 1269 (D. Az. 2012) (“Importantly, because the
 4 Website was not commercial, it was used only to criticize Aviva, and the Defendants never made
 5 any attempt to sell the domain names for profit, Defendants’ actions do not fall within the scope of
 6 the ACPA.”).

7 **D. The Court Should Allow Permissive Intervention**

8 Automattic also satisfies the requirements for permissive intervention. Plaintiff’s
 9 opposition cites the three requirements for permissive intervention and then proceeds to disregard
 10 them and apply its own standard. As discussed above, Automattic has a protectable interest in this
 11 litigation, but this is not a requirement for permissive intervention. As Plaintiff points out,
 12 Automattic need only establish: (1) independent grounds for jurisdiction; (2) the motion is timely;
 13 and (3) the applicant’s claim or defense, and the main action, have a question of law or a question
 14 of fact in common. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir.
 15 1997).

16 Here, as set forth in Automattic’s [Proposed] Answer and Counterclaim, the Court has
 17 subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 1338 and/or 1367 because the
 18 action arises under 15 U.S.C. § 1125(d). Venue is proper because Plaintiff brought suit in this
 19 district. As discussed in Automattic’s motion to intervene, this request is timely given that
 20 Automattic seeks leave to intervene less than three weeks after the complaint was filed. Finally,
 21 Automattic’s claim for declaratory relief shares the legal question with the main action regarding
 22 whether “ronkramermusclebeach,” a third-level domain, violates 15 U.S.C. § 1125(d).

23 Plaintiff does not dispute that Automattic’s proposed Answer in Intervention meets the
 24 Ninth Circuit test for permissive intervention.³ Nor does Plaintiff dispute that Automattic’s
 25 proposed Counterclaim meets the test. Plaintiff instead argues (1) that there is no case or

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 27 ³ The Opposition essentially ignores Automattic’s proposed Answer, and as Plaintiff has not
 28 presented any argument as to why the Answer doesn’t meet the test for permissive intervention,
 Automattic respectfully requests that the Court, at a minimum, grant Automattic’s motion and
 allow it to file the Answer.

1 controversy; (2) that Automattic’s proposed Counterclaim “expand[s] the issues;” and (3) that there
 2 is no dispute that “Automattic, unlike most third-level domain owners, is a registration authority.”

3 Automattic’s proposed Counterclaim neither seeks an advisory opinion nor expands the
 4 issues in this case. To the contrary, the proposed Counterclaim directly addresses Plaintiff’s own
 5 claim. Automattic’s proposed Counterclaim does not request a judgment declaring that all third-
 6 party domains are outside of the scope of the ACPA; rather, Automattic asks this Court to declare
 7 that the *Muscle Beach Domains*, put at issue by Plaintiff, do not violate the ACPA. (See Morton
 8 Decl., Ex. A Counterclaim at ¶ 10, Prayer ¶ C.) Plaintiff again mischaracterizes Automattic’s
 9 proposed Counterclaim, this time to suggest that permissive intervention is inappropriate because
 10 the proposed Counterclaim “would serve to greatly expand the issues in this case beyond those to
 11 which there is an actual case of controversy.” (Opp. at 12.) Plaintiff’s complaint claims that the
 12 Muscle Beach Domains, and specifically, the third-level domains, violate the ACPA. (Complaint,
 13 at ¶¶ 1, 2, 9-10.) Automattic’s proposed Counterclaim asks for a declaration that the Muscle Beach
 14 Domains do not violate the ACPA, and as a factual allegation, states that “Plaintiff wrongly seeks
 15 an injunction based on a third-level domain, when only second level domains are actionable.” (See
 16 Proposed Counterclaim at ¶ 7, Prayer ¶ C.) Plaintiff’s Complaint states that Automattic is a
 17 “domain name authority,” and Automattic’s proposed Counterclaims states that there is a dispute
 18 over whether Automattic is a “domain name authority.”⁴ (Complaint, ¶ 10; Proposed
 19 Counterclaim, ¶¶ 7-8.) Plaintiff does not deny that, as Automattic alleges, “A declaration that
 20 Plaintiff’s cybersquatting claim is barred will render moot many, if not all, existing claims and
 21 defenses in this Action.” (Proposed Counterclaim, ¶ 9.) Plaintiff’s tortured reading of the
 22 proposed Counterclaim does not change the fact that the proposed Counterclaim and “the main
 23 action have a question of law or fact in common.” Fed. R. Civ. Proc. 24(b)(2); *see also League of*
24 United Latin Am. Citizens v. Wilson, 131 F.3d at 1308. Further, although not required by the
 25 Federal Rules or the Ninth Circuit, Automattic’s proposed Counterclaim does not expand the scope
 26 of the case nor does it request an advisory opinion. Accordingly, the Court should grant

27 ⁴ Plaintiff alleges that Automattic is the registrar or domain name authority for the Muscle Beach
 28 Domains, but this is incorrect, as the “whois” results show that Automattic is not the registrar or
 domain name authority for the Muscle Beach Domains. (Morton Decl., Ex. B.)

1 Automattic's request to intervene to resolve this dispute.

2 **III. CONCLUSION**

3 For the foregoing reasons, Automattic respectfully requests that the Court grant its motion
4 to intervene and allow Automattic to file its proposed Answer and Counterclaim.

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6 Dated: May 19, 2015

PROCOPIO, CORY, HARGREAVES & SAVITCH
7 LLP

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By: /s/ Melinda M. Morton
9 Melinda M. Morton
Attorney for Non-Party
10 AUTOMATTIC INC.

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